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DEFENSE INTELLIGENCE AGENCY

WASHINGTON, D.C. 20301

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MEMORANDUM FOR THE CHAIRMAN, DIRECTOR OF CENTRAL INTELLIGENCE SECURITY COMMITTEE

SUBJECT: Proposed Replacement for EO 10450 (4 May 1976 draft)

1. Following are some general observations on the proposed executive order (EO) which is intended to replace EO 10450.

2. It is difficult to provide brief and direct comments with respect to a document of such monumental length (9,000 words, as compared with 2,400 in the 1953 EO), and overwhelming redundancies which beseech careful editing. This draft must be carefully analyzed against the content of standing directives, other executive orders, and certain paragraphs of the U.S. Code. The broad scope draws doubt as to its validity as an EO and certainly begs the question as to whether it alters the current system other than procedurally.

3. It must also be kept in mind that the current EO has nothing to do with persons in the military services. Certain statutory exemptions for the Federal Bureau of Investigation (FBI), the Central Intelligence Agency (CIA), and the National Security Agency (NSA) are recognized and makes us wonder if the rest of us in the Intelligence Community are on the outside, looking in. The main problems with the proposed EO are:

a. Security considerations appear to take a back seat in the DoD to the revised suitability standards of the CSC (q.v., Federal Personnel Manual System, FPM Letter 731-3, subject: Suitability Guidelines for Federal Employment - advance edition limited), 3 July 1975.

b. What begins as an EO, quickly becomes a manual.

4. Other than the foregoing general observations, comments to the proposed EO are as follows:

a. Page 1. Adjudication: Make some mention of the adjudicative responsibility to address security factors along with conduct and character considerations.

b. Page 1. Adverse Determination:

(1) There exists no appeal procedure for the denial of access to Sensitive Compartmented Information (SCI). This item should be placed on the Security Committee agenda.

DIA has no objection to declassification and release.

DIA review(s) completed.

(2) Position of Special Trust (POST), a nice new term which apparently combines the old position of trust with critical-sensitive or sensitive positions.

c. Page 1. Agency Head: Conflicts with EO 11905. Since DIA was not established by statute or EO, the Director, DIA, will have no control over his civilian personnel if this definition is allowed to stand. The problem is easily remedied by deletion of phrase "established by statute or Executive Order."

d. Page 1. Allegiance: This is generally accepted as synonymous with loyalty, which is more direct and understandable. The use of the term "political entity" is fuzzy. Rewrite this paragraph to clearly define what is meant in the security/suitability context.

e. Page 3. Loyalty: See comments under Allegiance, Page 1.

f. Page 3. National Agency Check: A rather sloppy definition. Editorial change: Defense Central Index of Investigations (DCII).

g. Page 3. National Interest: Important definition of national security as within the national interest. Not stressed adequately throughout EO.

h. Page 4. Position of Special Trust: Misconduct and malfeasance are synonymous.

i. Page 4. Security Determination: Belongs with Adjudication on Page 1.

j. Page 4. Sensitive Compartmented Information: This is not defined per se in EO 11905, but in DCID 1/14. EO 11905 does mention, however, "special offices within the DoD for the collection of specialized intelligence through reconnaissance programs." (probably not worth quibbling about)

k. Page 5. Suitability, Suitability Determination, Suitability Factors, and Suitability Standard: These four separate definitions point up the unnecessary length of the proposed EO and are further amplified on Page 7., Section 5: Suitability Standards.

1. Page 5., Section 3.(a) General Purpose of the Order: This should be Section 2., Page 1. Definitions should follow Purpose which should set the theme. Here, once again the myriad of redundancies with respect to suitability are highlighted, and security should be mentioned under Purpose. While avoiding security considerations, it contains a warning that collection of "personal information" is limited to that

which is "relevant and necessary," a phrase which says nothing which is not already policy. This Section epitomizes the need for careful editing prior to the official floatation of this proposed EO. When we talk of "effective oversight" are we not toadying to a current hot item in the Intelligence Community? Too much puffery and persiflage!

m. Page 6., Section 3.(b) Establishment of the Federal Civilian Personnel Suitability Investigation and Adjudication Program: Presumably, we should have a uniform investigative and adjudicative program. The question is basically whether such a program, linking investigations to adjudications, is realistic or even lawful, and whether this proposed EO is the proper vehicle to establish such a program. Furthermore, there is subjective reference to the CIA, the FBI and the NSA - but no mention of the DoD agencies which operate within the frame work of DCID 1/14 for access to SCI. The Director of Central Intelligence has clear responsibility under EO 11905 for the protection of intelligence sources and methods throughout the Intelligence Community, not merely in the CIA.

n. Page 6., Section 4. Applicability: (1) Insert "5 U.S.C. 7501, et seq" after "August 26, 1950" to remain consistent with the preamble.

o. Page 7., Section 5. Suitability Standards: Subsection (a) is the "Nexus Theory" as set forth in Federal Personnel Manual letter 731-3 of 3 July 1975.

p. Page 7., Section 6.(a) Positions of Special Trust: Again, misconduct and malfeasance are redundant.

q. Page 8., Subsection 6.(a)(1) National Security: Since we are addressing only civilian personnel, recommend the term "military security" be changed to "national defense." Substitute "national security" for "national defense."

r. Pages 8. and 9., Subsection 6.(b) Criteria for Designating Positions of Special Trust: Add "and National Welfare Positions" in order to be consistent with the subparagraphing. Also, eliminate all references to SCI and intelligence sources and methods which are mandated to the Director of Central Intelligence and/or are covered by EO 11905 ("United States Foreign Intelligence Activities"), 1 March 1976. A simple note that all persons covered by EO 11905, or holding access to SCI, are to be considered as holding Positions of Special Trust, would suffice.

s. Page 10., Subsection 6.(c)(1) Authority to Designate (Positions of Special Trust): Conflicts with EO 11905. Put a period after "components." Otherwise, the Director, DIA, would have no such authority under the EO (q.v., Page 1., Section 2., definitions of Agency Head).

t. Page 10., Subsection 6.(c)(2)(i)(ii) and (iii) Certification and Redesignation: Since DIA policy (DIAR 50-28, "Civilian Applicant and Employee Security Program," 31 March 1967) requires that "all persons employed in DIA must meet the standards and criteria for critical sensitive positions," the Director, DIA, now would have to make either a blanket certification that all DIA civilians are designated as holding Positions of Special Trust or designate those which are, and he would have to certify annually the validity of such designation. Blanket certification is preferable in that it would eliminate a large amount of paperwork.

u. Page 11., Subsection 7.(b) Limits on Investigative Matters:

(1) Too choppy, disjointed, rambling and unspecific. Requires the services of an attorney and an editor.

(2) In its effort to protect the civil rights and rights to privacy, this subsection can easily be interpreted as precluding the gathering of information which is absolutely necessary to proper adjudication. For instance, the exclusion of inquiry into the status of physical health may well deny the adjudicative authority information which has a definite bearing on mental health and emotional stability. Mental health is often masked by physical diagnoses and, conversely, mental abnormalities are frequently the result of serious physical ailments.

(3) Financial matters, while usually highly personal, have been repeatedly uncovered as one of the classic vulnerabilities in espionage. (Air Force notes apparent conflict with 7.(d)(1)(iv), page 13.)

v. Page 12., Section 7.(d) Investigations Concerning Positions of Special Trust: A problem which continually surfaces here is confusion with the standards set forth in Section 5., Page 7. In some places, the EO seeks to apply to both Positions of Special Trust and to General Standard Positions. Elsewhere, it seems to apply only to POST.

w. Page 16., Section 7.(f)(2) Notice to the Individual: In an effort to underscore the rights to privacy and disclosure, proposed EO becomes too verbose. This should be telescoped to reflect that which is required by law (primarily, the Freedom of Information and Privacy Acts).

x. Pages 17. and 18., Section 7.(f)(4) Investigative Limitations with Respect to Privacy:

(1) Poor wording - inaccurate and ranges far afield (i.e., "inspection of trash").

(2) The word "testimony" is too strong and is not used in the legal sense.

(3) Very importantly, the inability of investigators to give the express promise of confidentiality will likely prove to be the single most effective obstacle to any meaningful investigative program. Use of surreptitious and/or technical devices is thrown in for good measure, whereas it is covered elsewhere as in the Federal Personnel Manual.

y. Page 19., Section 7.(g) Investigative Responsibility: Last sentence: Notification of satisfactory completion in lieu of a full ROI is not acceptable. DIA reserves the right to adjudicate its own cases and will not release this right to investigative personnel or to case control officers.

z. Page 21., Section 8.(b)(1) Reasons for Disqualification - General: Add ". . . Standard Positions." Delete "All . . ." for consistency with Section 5.(a), page 7.

aa. Page 22., Section 8.(b)(2)(iii) Positions of Special Trust: Does not jibe with Page 11, Section 7.(b), which precludes gathering medical information.

bb. Page 26., Section 8.(e) Notice to the Individual: Recommend deletion as unnecessary and administratively burdensome. Adverse determination will be a matter of record and the employee concerned is entitled to be counselled, if requested.

cc. Pages 27. and 28., Section 10. Procedures Concerning Positions Which Involve National Security: According to the DIA General Counsel, this whole section modifies 5 U.S.C. 7532 by conferring additional rights on individuals and expanding the rights contained in the statute. These two things should be read in conjunction with each other. There are two additional statutes which come to bear: 5 U.S.C. 7312 and 5 U.S.C. 3571, and there might be conflict between the language in the two statutes and that in the EO.

dd. Page 30., Section 10.(b)(x): Line 14: Add "or agency" after "department."

ee. Page 31., Section 11. Reinstatement, Restoration and Re-employment: DIA General Counsel advises we again check 5 U.S.C. 7312 and 5 U.S.C. 3571 here and in conjunction with Section 12., below.

ff. Page 32., Section 12. Review of Adverse or Questionable Information Arising Subsequent to Favorable Suitability Determination:

(1) See Section 11., above.

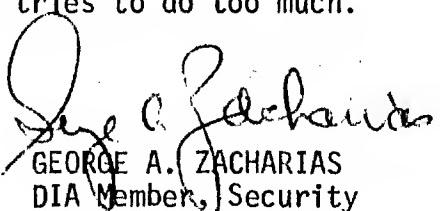
(2) What are the definitions of "civilian officers" or "employees." Are employees loosely in the category of enlisted military personnel.

gg. Page 32., Section 13.(a) General Policy Oversight: This EO says that the Executive Office of the President, the NSC and the OMB shall exercise oversight of the CSC operation of the Federal Personnel Suitability Investigation and Adjudication Program (see Section 3., 1b), above. We wonder whether there is either conflict or consistency within the DoD. On 14 May 1976, DepSecDef Ellsworth established a DoD Inspector General for Intelligence who reports directly to Mr. Ellsworth "with responsibility for insuring the complete legality and propriety of Defense intelligence activities." The DoD IG is to "work closely with the President's new Intelligence Oversight Board," a group of prominent persons from outside of government (see Section 6. of EO 11905). No member of this Board shall have any "personal contractual relationship with any agency or department" of the Intelligence Community. The Board shall "receive and consider" reports by IG's and GC's of the Intelligence Community with respect to questions of "legality and propriety."

hh. Page 33., Section 13.(b) Responsibilities of the Departments and Agencies: Since DIA was not established under statute or EO, we would be precluded from functioning under this subsection.

ii. Pages 33-36., Section 13.(c) through (f). Full of repetitions and redundancies. An EO should not address training, release procedures, disposal of ROI's or forms! Retention of Reports (page 36) should be measured against DIRC requirements.

5. In summation, the proposed EO tries to do too much.


GEORGE A. ZACHARIAS
DIA Member, Security Committee